

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**STATE OF MISSOURI EX REL.  
CHRIS KOSTER,**

**RELATOR,**

**v.  
THE HONORABLE WARREN McELWAIN,  
CIRCUIT JUDGE OF DEKALB COUNTY,  
AND JULIE WHITSELL, CIRCUIT CLERK  
DEKALB COUNTY CIRCUIT COURT,**

**RESPONDENTS.**

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DOCKET NUMBER WD73211  
DATE: March 29, 2011

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Appeal From:

Dekalb County Circuit Court  
The Honorable Warren McElwain, Judge

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Appellate Judges:

Writ Division: Cynthia L. Martin, Presiding Judge, Mark D. Pfeiffer, Judge and Gary D. Witt,  
Judge

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Attorneys:

Stephen D. Hawke, Jefferson City, MO, for relator.

Sean D. O'Brien and Bronwyn Werner, Kansas City, MO, for Respondents.

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**MISSOURI APPELLATE COURT OPINION SUMMARY**

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**RESPONDENTS.**

No. WD73211

Dekalb County

Before Writ Division: Cynthia L. Martin, Presiding Judge, Mark D. Pfeiffer, Judge and Gary D. Witt, Judge

The State filed a writ of certiorari following the Honorable Warren McElwain's issuance of a writ of habeas corpus vacating Dale Helmig's 1996 conviction for the first degree murder of his mother, Norma Helmig. The habeas court found that Dale Helmig had established the gateway of cause and prejudice and the gateway of innocence as to permit review of procedurally defaulted claims of constitutional infirmities alleged to have affected the fundamental fairness of Dale Helmig's trial. The habeas court found that each of the constitutional infirmities alleged by Dale Helmig was meritorious. The habeas court also found that Dale Helmig established a freestanding claim of innocence by clear and convincing evidence, independently warranting issuance of the writ of habeas corpus.

In its writ of certiorari, the State contends that the habeas court lacked authority to entertain Dale Helmig's procedurally defaulted claims. The State further contends that the habeas record does not support a finding that Dale Helmig established a gateway permitting review of procedurally defaulted claims, does not support a finding that any of the procedurally

defaulted claims are meritorious, and does not support a finding that Dale Helmig established a freestanding claim of innocence.

**We do not quash the record of the habeas court in part, and we quash the record of the habeas court in part.**

(1) Our review on a writ of certiorari is limited to whether the habeas court exceeded its authority to grant habeas relief or abused its discretion in issuing the writ of habeas corpus. We review questions of law presented by the record before the habeas court. We do not review findings of fact.

(2) Where several alternative avenues permitting habeas corpus review and several claims of constitutional infirmities were found to be meritorious, we need only determine that at least one avenue permitted habeas review, and that at least one claim had merit to uphold the writ of habeas corpus.

(3) A habeas court is permitted to review procedurally defaulted claims in a habeas proceeding if: (a) the claim relates to a jurisdictional (authority) issue; or (b) the petitioner establishes manifest injustice because newly discovered evidence makes it is more likely than not that no reasonable juror would have convicted the petitioner (a "gateway of innocence" claim); or (c) the petitioner establishes the presence of an objective factor external to the defense, which impeded the petitioner's ability to comply with the procedural rules for review of claims, and which has worked to the petitioner's actual and substantive disadvantage infecting his entire trial with error of constitutional dimensions (a "gateway cause and prejudice" claim).

(4) The "cause" component of the gateway of cause and prejudice may be established by showing that the factual or legal basis for a claim was not reasonably available to the petitioner.

(5) The State's failure to disclose the existence and possible testimony of Tina Ridenhour constituted "cause" for Dale Helmig's failure to raise a *Brady* violation in his Rule 29.15 hearing where Dale Helmig did not learn of Tina Ridenhour's existence, or of her potentially beneficial testimony, until after his Rule 29.15 motion had been filed.

(6) The State's failure to disclose Norma Helmig's repeated reports of abuse at the hands of her estranged husband, Ted Helmig, constituted "cause" for Dale Helmig's failure to raise a *Brady* violation in his Rule 29.15 hearing. After Dale Helmig's post-conviction remedies had been exhausted, the parties discovered that cancelled checks found with Norma Helmig's discarded purse could not have been mailed to Norma Helmig until after her death, and that Ted Helmig had possession of the cancelled checks after Norma Helmig's death. The purse was key evidence in Norma Helmig's murder. Once Ted Helmig became "connected" to the purse, any and all evidence of his motive and opportunity to murder Norma Helmig became admissible. Until that time, however, a claim of a *Brady* violation would not have been successful, as evidence of another's motive and opportunity to commit a crime is not admissible unless that person is connected to evidence of the crime.

(7) Dale Helmig established a gateway of cause and prejudice permitting review of his claimed *Brady* violations. Due process required the prosecution to disclose Norma Helmig's numerous reports of abuse and the existence of Tina Ridenhour to Dale Helmig as the evidence was favorable to him and material to his guilt.

(8) Dale Helmig learned that a map not in evidence had been provided to the jury during its deliberations after the exhaustion of his Rule 29.15 proceedings. Dale Helmig thus established "cause" which prevented him from complying with the State's procedural rules regarding timely assertion of his claim of jury misconduct in his Rule 29.15 motion.

(9) The delivery to the jury of an exhibit not received in evidence constitutes error. Such error constitutes a ground for reversal if the defendant's substantive rights were prejudiced.

(10) There is a rebuttable legal presumption that external communications with jurors were prejudicial. There is no reasoned basis to deprive a petitioner in a habeas corpus proceeding of the benefit of this presumption when the presumption would have been afforded to the petitioner on direct appeal. This is particularly so where the gateway of cause and prejudice is established.

(11) Under the facts and circumstances of this case, the State did not satisfy its burden to prove that Dale Helmig was not prejudiced by the admission of a map into the jury room during deliberations, and thus before the jury reached a unanimous verdict.

(12) We do not quash the record of the habeas court on the grounds for issuance of a writ of habeas corpus herein described. We quash the record of the habeas court on the alternative ground of the gateway of innocence and on the alternative ground of a freestanding claim of innocence. The writ of habeas corpus affects nothing more than a procedural outcome--the vacation of Dale Helmig's conviction. That would be the case regardless the number, or nature, of the grounds on which the writ of habeas corpus is issued.

(13) Dale Helmig's conviction for the first degree murder of his mother is vacated. If Dale Helmig is not retried by the State within 180 days of the date of the issuance of our mandate, he shall be discharged from the State's custody.

Opinion by Cynthia L. Martin, Judge

March 29, 2011

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